United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 899

Case No. 970: RANDALL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Evelyn Nana Randall, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 April 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 April 1997, the Applicant filed an application requesting the Tribunal, inter alia:

"6. ... to find that:

(i) The failure of the Respondent to have her personnel records complete, up-to-date, and submitted in a timely manner to the relevant promotion bodies, including the Appointment and Promotion Board, in connection with her application for the P-5 post of Chief, Operational Accounts Section, Department of Administration and Management (DAM) ... [and other posts], was a violation of her right to due process.

(ii) The decision of the Secretary-General to select another candidate other than the Applicant for the P-5 post of Chief, Operational Accounts Section, [DAM], in 1994 violated her right to due process.

...

7. ... [T]o order the Respondent to:

(i) Promote the Applicant ... to a P-5 level post commensurate with her qualifications, experience, performance and seniority.

(ii) Implement fully the recommendation of the Joint Appeals Board for compensation in the amount of three months net base salary. ... In other words, to pay the Applicant three months net base salary less the amount of $500 paid to her in December 1996, as compensation.

(iii) Complete the Applicant's Performance Evaluation Reports (PERs), covering the periods 11 July 1992 to 8 May 1993, and 23 June 1993 to 31 March 1996, which, as of the date of this application are still pending.

8. ... [And further to] order that:

(i) [If] the Secretary-General is unable to take the necessary executive action to promote her, ... the Applicant should be granted compensation in the amount of one year of her net base salary ...

(ii) In addition ... the Respondent should make every effort to have the Applicant fairly and seriously considered for promotion, as soon as possible, to a P-5 post for which she is qualified."

Whereas the Respondent filed his answer on 29 July 1998;

Whereas, on 18 September 1998, the Applicant informed the Tribunal that, on 1 August 1998, she had been promoted to the P-5 level post of Chief, Trust Fund, Technical Cooperation and Revenue Section, Office of Programme Planning, Budget and Accounts, DAM, and thus, she had decided to withdraw the pleas set forth in paragraphs 7(i) and (iii), and 8(i) and (ii) of her application, quoted above;

Whereas the Applicant filed written observations on 21 September 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 11 November 1974, on a two-year fixed-term appointment as Associate Accountant, at the P-2 level, in the Accounts Division, Office of Financial Services. Her fixed-term appointment was extended until 1 August 1977, when she was granted a permanent appointment and promoted to the P-3 level. On 1 August 1985, she was promoted to the P-4 level. From 21 June to 30 November 1989, the Applicant was assigned to UNTAG, Namibia, as Electoral Supervisor. She was temporarily assigned to UNIFIL, from 15 June to 31 August 1990, as Acting Chief Finance Officer. From 24 April 1991 to 22 June 1993, the Applicant was assigned to the United Nations Iraq-Kuwait Observer Mission (UNIKOM), as Chief Finance Officer.

On 7 July 1993, the Chief Military Observer, UNIKOM, sent the Applicant's performance evaluation report (PER) for the period from 24 April 1991 to 8 March 1993 to the Director, Field Operations Division, UNIKOM Headquarters. In a cover memorandum, the Chief Military Observer, noted his strong disagreement with the First Reporting Officer's ratings for the Applicant and attached a copy of his predecessor's comments on the staff member's first year of service with UNIKOM. On 9 September 1993, the Applicant submitted a statement of rebuttal against that PER. On 21 March 1994, the Applicant submitted additional information to the Rebuttal Panel.

On 19 April 1994, the Applicant applied for the vacant P-5 post of Chief, Operational Accounts Section, DAM.

On 13 May 1994, the Rebuttal Panel issued its report recommending that "the [Applicant's] PER was so obviously and grossly unfair, biased and vindictive that it should be withdrawn in toto and a new report drawn up".

On 28 July 1994, the Applicant sent to the Secretary, Appointment and Promotion Board (APB), additional information in support of her candidacy for the post of Chief,

Operational Accounts Section. On 2 September 1994, the Secretary of the APB informed the Applicant that she had not been selected for that post.

By memorandum dated 5 September 1994, the Under-Secretary-General for the Department of Peace-keeping Operations (DPKO) informed the Assistant Secretary-General for Human Resources Management that he concurred with the conclusion in the Rebuttal Panel's report dated 13 May 1994, that the Applicant's PER for her service in UNIKOM should be withdrawn. He further recommended that "a new [PER] be prepared by the then Chief Military Observer, [UNIKOM]".

On 19 September 1994, the Applicant wrote to the Secretary-General requesting a review of the administrative decision not to promote her to the position of Chief, Operational Accounts Section. By memorandum dated 19 September 1994, the Personnel Officer, Staff Administration & Monitoring Services informed the Applicant of the recommendation by the Under-Secretary-General, DPKO, that her contested PER be withdrawn and that a new PER be prepared. On 26 September 1994, the Applicant again wrote to the Secretary-General requesting him to take into account this new development in reviewing the decision not to promote her to the post for which she had applied. In the absence of a reply to her request for review, on 14 November 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 10 March 1995, a former Chief Military Observer, UNIKOM, completed a PER covering part of the Applicant's service with UNIKOM, from 24 April 1991 to 10 July 1992.

The JAB adopted its report on 9 July 1996. Its conclusions and recommendation read as follows:

> "45. In light of the foregoing, the Panel unanimously agreed that the decision of the Secretary-General to select a candidate other than the Appellant for the P-5 post of Chief, Operational Accounts Section, DAM, violated the Appellant's right to due process.

46. The Panel unanimously recommends that the Respondent make every effort to have the Appellant fairly and fully considered for promotion, as is her right, at the earliest possible date, to a vacant P-5 post for which she is qualified.

47. The Panel unanimously recommends that the new PER covering the Appellant's performance for the period 24 April 1991 through 8 March 1993 be prepared without further delay.

48. The Panel unanimously recommends that the Appellant be compensated in the amount of three months of her net base salary for the violation of her right to have her personnel records complete, up-to-date, and submitted in a timely fashion to the Departmental Review Panel and the APB.

49. The Panel further recommends that the cost of the compensatory payment be reimbursed to the Organization, under staff rule 112.3, by those officials directly responsible for the negligent treatment of the Appellant.

50. The Panel unanimously agreed to make no further recommendation in support of the appeal."

On 31 October 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of the conclusions and recommendations of the Panel. The Secretary-General is not in agreement with the Panel that the decision not to select you for the post in issue was a violation of your right to due process. The Secretary-General is of course in agreement with the Panel that you should be fairly and fully considered for promotion at all times for any vacant P-5 post for which you apply and are found to be qualified. Although the record is clear that a performance evaluation report has been completed and signed by you for part of the period mentioned by the Panel, 24 April 1991 through 8 March 1993, the Secretary-General is in agreement and will ensure that a PER covering the remaining period is prepared without further delay.

The Secretary-General has taken note of the finding of the Panel that your personnel records were not complete, up-to-date and submitted in a timely fashion to the Departmental Review Panel and the Appointment and Promotion Board. He has also noted the recommendation of the Panel that you be compensated in the amount of three months of your net base salary. The Secretary-General has decided to accept the findings of the Panel but not its recommendation regarding compensation. He has decided, however, to compensate you in the amount of $500.00 for the fact that your personnel records were not complete, up-to-date and submitted in a timely fashion to the Departmental Review Panel and the Appointment and Promotion Board.

The Secretary-General is also taking steps to ensure that the personnel records of all staff members are brought up-to-date immediately.

The Secretary-General has taken note of the Panel's recommendation regarding reimbursement by responsible officials of the compensation payment. Although acknowledging the principle behind the Panel's recommendation, the Secretary-General is not in agreement that the circumstances of your case warrant the application of the staff rule.

..."

On 29 April 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied due process before the APB because her personnel records were not up-to-date when she applied for the post of Chief, Operational Accounts Section.

2. The Respondent unduly delayed the finalizing of her PER for the period 21 April 1991 to 8 March 1993, which significantly curtailed her chances of receiving fair consideration for posts for which she applied.

3. The $500.00 awarded to the Applicant was inadequate compensation for the injury that she suffered.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion.

2. The Applicant was given fair and full consideration by the appropriate promotion bodies in connection with her candidature for vacant posts. The unavailability of the Applicant's PERs for submission to the appropriate promotion bodies was not a denial of her right to due process.

The Tribunal, having deliberated from 28 October to 20 November 1998, now pronounces the following judgement:

I. The case arises from the failure of the Respondent to promote the Applicant, in September 1994, from the P-4 level to a P-5 position for which she had applied on 19 April 1994. The Applicant's performance evaluation report (PER) for the period 24 April 1991 through 8 March 1993, had not been submitted to the Appointment and Promotion Board. The PER for that period had been challenged by the Applicant on 9 September 1993. The Rebuttal Panel, in its report dated 13 May 1994, concluded that there had been prejudice in the preparation of the PER and recommended that it be withdrawn and that a new report be prepared. It was not until 5 September 1994, that the Under-Secretary-General, Department of Peace-keeping Operations, in whose department the Applicant served, informed the Administration that he concurred that the PER in question be withdrawn and a new one be prepared by the Applicant's Second Reporting Officer. A partial PER for the period 24 April

1991 to 10 July 1992 was not completed until 14 June 1995. In the meantime, the Applicant, after receiving no response to her request for administrative review of the decision not to promote her, on 14 November 1994, filed an appeal with the Joint Appeals Board (JAB). The JAB recommended that the Applicant be compensated in the amount of three months net base salary for the violation of her rights resulting from the absence of up-to-date PERs in her personnel file. The Secretary-General, while agreeing in part with the JAB, decided to compensate the Applicant in the amount of $500. Subsequently, the Applicant applied for two P-5 level vacant posts. She was later promoted to the P-5 level post of Chief, Trust Fund, with effect from 1 August 1998.

II. The issue in the case is whether the Applicant has been wronged in any way in connection with the failure to promote her in September 1994.

III. As the Tribunal has held, a staff member has no right to promotion in the absence of a specific legal obligation creating a corresponding right to promotion (cf. Judgement No. 275, Vassiliou (1981)). The administrative authority has discretion in regard to promotion (cf. Judgements No. 275, Vassiliou, No. 375, Elle (1986), and No. 390, Walter (1987)). However, this discretion is not absolute and must be exercised in such a way that the staff member is accorded fair treatment. The Tribunal has found procedural irregularities to result in unfair treatment in cases where PERs are improperly missing from or improperly considered in the promotion process (cf. Judgements No. 312, Roberts (1983), No. 314, Tomiak (1983)). A procedural irregularity can also arise from the failure to have such reports prepared in time, when such failure precludes their consideration in the promotion process (cf. Judgements No. 198, Lane (1975), No. 412, Gross (1988) and No. 539, Bentaleb (1991)). Thus, the Tribunal has previously held that the lack of sufficient information about a candidate may affect the entire promotion process, as there is no way of knowing how such

lack of information may have influenced the APB's recommendation (cf. Judgement No. 412, Gross, (para. XVI)).

IV. In this case, the Applicant's right to fair consideration and fair treatment in the promotion process for the position for which she applied in April 1994, was prejudiced by the Respondent's failure to prepare in time and take into consideration a proper appraisal report for the period 24 April 1991 to 8 March 1993. The Tribunal notes that the Respondent is required, under the Staff Rules, to prepare timely PERs. The Administration is responsible for the defects in the PER that had been challenged and for the failure to prepare a new PER in a timely manner, which may have resulted in the APB's failure to recommend the Applicant for a post in September 1994. The failure to keep the Applicant's personnel records up-to-date is inexcusable. For this procedural irregularity the Applicant must be compensated, even though there is no certainty that, had the records been available, she would have been selected for promotion. The treatment she was given was unfair and resulted in the violation of her rights. The Tribunal assesses the compensation at six months of her net base salary at the rate in effect on the date of this judgement.

V. The Applicant has since been promoted with effect from 1 August 1998, but this does not absolve the Administration from its responsibility to prepare PERs in a timely manner and thereby ensure fairness in the promotion process.

The Tribunal also notes that the Applicant's subsequent PERs have not been completed. This omission should be rectified so that the Applicant's evaluation records are kept up-to-date. The Tribunal cannot emphasize enough the importance of keeping evaluation records up-to-date, in accordance with the Staff Rules.

VI. For the reasons stated in paragraphs IV and V above, the Tribunal orders the Respondent to pay to the Applicant six months of her net base salary at the rate in effect on

the date of this judgement, less the $500 that the Applicant already received from the Respondent.

VII. The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
Fist Vice-President, presiding

Deborah TAYLOR ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary